SIME HOK SDN BHD

v.

SOH POH SHENG

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CIVIL SUIT NO: (MT-1) 22-709-2002]
7 SEPTEMBER 2009

CONTRACT: *Agreement - Oral agreement - Breach - Failure to honour obligation - Claim for damages - Whether plaintiff failed to assert or enforce its right within reasonable time - Whether claim barred by laches - Filing of plaintiff's suit outside six year limitation period - Whether claim unenforceable for being time barred - Limitation Act 1953, s.6(1)(a)*

LIMITATION: *Cause of action - Claim for damages - Breach of oral agreement - Whether plaintiff failed to assert or enforce its right within reasonable time - Filing of plaintiff's suit outside six year limitation period - Whether claim unenforceable for being time barred - Limitation Act 1953, s. 6(1)(a)*

The plaintiff's claim was predicated on an alleged oral agreement whereby the defendant agreed to cause the removal or cancellation of caveats lodged over certain properties. The plaintiff contended that the defendant failed to honour his obligations and was claiming for the sum of RM900,000 and damages together with interest and costs. It was the defendant's contention that even assuming the defendant had breached his promise to remove the caveats, the plaintiff's claim was barred by limitation under s. 6(1)(a) of the Limitation Act 1953.

Held (dismissing plaintiff's claim):

(1) In an action founded on a contract the cause of action accrues on the date of its breach and time begins to run from that breach. The cause of action giving rise to the plaintiff's claim arose in 1992 or 1993. When the defendant had failed to honour his obligations by the end of 1994, all the conditions were present to enable the plaintiff to sue on its rights. The cause of action would have accrued on 31 December 1994. In 1997, the plaintiff issued a letter of demand to the defendant. As the defendant failed to comply

A with the plaintiff's demand, the plaintiff issued another demand in May 2002. In the aforesaid circumstances, the plaintiff failed to assert or enforce its right within a reasonable time. No explanation was given by the plaintiff for the unreasonable delay between 1994 to 2002. In this regard, the plaintiff's
B claim was barred by laches. The filing of the plaintiff's suit on 20 September 2002 was also outside the six year limitation period which expired on 31 December 2000. In the premises the plaintiff's claim was unenforceable for being time barred. (para 20)

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Case(s) referred to:

Ban Hong Joo Mines Ltd v. Chen & Yap Ltd [1968] 1 LNS 13 FC ***(refd)***
Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA
D ***(refd)***
Lim Kean v. Choon Koon [1969] 1 LNS 94 HC ***(refd)***
Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1976] 2 MLJ 177 ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
E *Nyap Kui Fah v. Len On Contractor [1977] 1 LNS 9 FC* ***(refd)***
Ponnusamy & Anor v. Nathu Ram [1958] 1 LNS 46 HC ***(refd)***
Saw Gaik Beow v. Cheong Yew Weng & Ors [1989] 1 LNS 75 HC ***(refd)***
The Great Eastern Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
Tyagaraja Mudaliar & Anor v. Vedathanni [1935] 1 LNS 92 PC ***(refd)***

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Legislation referred to:

Contracts Act 1950, s. 47
Evidence Act 1950, s. 92
Interpretation Acts 1948 and 1967, s. 54(2)
G Limitation Act 1953, ss. 6(1)(a), 9

Other source(s) referred to:

*Dato' Seri Visu Sinnadura*i, Law of Contract, 3rd edn, pp 675-768

For the plaintiff - Sebastian Cha; M/s Sebastian Cha & Co
H *For the defendant - Dr Wong Kim Fatt (Wong Boon Lee with him); M/s Gulam & Wong*

Reported by Suhainah Wahiduddin

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JUDGMENT

Vernon Ong Lam Kiat JC:

[1] Sime Hok Sdn. Bhd.'s claim is predicated on an alleged oral agreement whereby Soh Poh Sheng (the defendant) agreed to cause the removal or cancellation of caveats lodged over certain properties. Sime Hok Sdn. Bhd (the plaintiff) contends that the defendant failed to honour his obligations and is claiming for the sum of RM900,000 and damages together with interest and costs.

The Facts As Presented By The Evidence

[2] In 1979 Carima Binaan Sdn. Bhd. entered into joint-venture agreements with the proprietors of three pieces of land all in the Mukim of Pontian Johor for the purposes of housing development. The three properties were (i) EMR 1633 Lot 3660 ('Lot 3660') owned by Yoong Nyook Shin and Yong Fai Sern; (ii) EMR 1666 Lot 2100 ('Lot 2100') owned by Moh Poh Um; and (iii) EMR 896 Lot 2043 ('Lot 2043') owned by Loh Wan Chek @ Low Chi Yang. In 1989 MDV Properties Sdn. Bhd. ('MDV') took over the housing development project from Cariman Binaan Sdn. Bhd. which failed to carry out the housing project. Meanwhile, Lot 3660 and Lot 2100 have already been sub-divided into 115 lots ranging from HS(M) 2851 PTD 8564 to HS(M) 2965 PTD 8678.

[3] MDV also failed to carry out the housing development project. Towards the end of 1992 Ting Ah Soi @ Teng Ah Sai (PW3) a director of the plaintiff company, Virinder Singh a/l Marmohan Singh (PW1) a director and shareholder of MDV and the defendant attended a meeting at the law offices of R. Muthu & Co. to discuss the defendant's proposal for the plaintiff company to take over the housing development project from MDV. At the meeting it was agreed between the parties that:

(i) MDV agreed to sell the three pieces of land to the plaintiff subject to the condition that the plaintiff settle the outstanding debt of RM1,550,000 owing by MDV to Hock Hua Bank Berhad ('the bank') and to redeem the three pieces of land that were charged to the bank as security for the loan; and

(ii) The plaintiff agreed to the transfer of Lot 2043 from MDV to the defendant on the condition that the defendant agreed to remove the caveats entered by Moh Poh Um (owner of Lot 2100) and Yoong Nyook Shin and Yong Fai Sern (co-owners

A of Lot 3660) either utilising the sale proceeds of Lot 2043 or by negotiations and to settle all the original landowners' interests in the housing development project.

[4] The total redemption sum for the three pieces of land was B RM1,550,000. By a cheque dated 24 December 1992 the defendant advanced a sum of RM155,000 which was paid to the bank in order to prevent the auction of the three pieces of land. The plaintiff repaid the said sum of RM155,000 to the defendant on 12 January 1993. Subsequently the plaintiff settled the balance C of the redemption sum of RM1,395,000 with the bank and took delivery of the original title deeds of the 115 sub-divided lots and Lot 2043. Save and except for eight of the 115 sub-divided lots which were caveated by Yoong Nyook Shin and Yong Fai Sern, the remaining 107 sub-divided lots were subsequently transferred D to the plaintiff in pursuance to the agreement for sale as stated in para. (i) above.

[5] Pursuant to the oral agreement MDV and the defendant entered into an agreement dated 16 February 1993 for the E transfer of Lot 2043 for the sum of RM900,000. The defendant did not pay the sum of RM900,000 to MDV. The sum of RM900,00 stipulated in this agreement was to enable the defendant to sell Lot 2043 to a third party at that price so as to use a portion thereof to settle all the original landowners' interests F under the housing development project.

[6] In furtherance of the oral agreement and at a meeting with Moh Poh Um, Yong Nyook Shin and Yong Fai Sern the defendant made an offer to buy over their interests in the housing project. Meanwhile, the defendant entered into two separate G agreements both dated 16 February 1993 with Moh Poh Um and Loh Wan Chek for the purchase of their respective shares in the housing project. There was no agreement with Yong Fai Sern and Yoong Nyook Shin as they had rejected the defendant's initial offer and subsequent offer at another meeting a few months later. H

[7] Meanwhile on 10 March 1993 PW3 and the defendant of the one part and the shareholders of MDV of the other part entered into an agreement for the purchase of all the shares in MDV ('the Share Sale Agreement'). The Share Sale Agreement I was subsequently abandoned. After settling Loh Wan Chek's interest (Lot 2043), the defendant entered into an agreement on 12 April 1993 for the sale of Lot 2043 to Chin Leong Lee Kee

Sdn. Bhd. for RM900,000. By this time the defendant has already settled the interests of two of the original landowners, namely Moh Poh Um (lot 2100) and Loh Wan Chek (Lot 2043); but the interests of Yoong Fai Sern and Yoong Nyook Shin (Lot 3660) remained unsettled because they had rejected the defendant's offer.

[8] On 11 December 1993 the plaintiff entered into an agreement with Sime Hup Sdn. Bhd for the sale of the 115 sub-divided lots to Sime Hup Sdn. Bhd. for RM1,550,000. Pursuant to this agreement the plaintiff transferred 107 of the 115 sub-divided lots to Sime Hup Sdn. Bhd.

[9] In 1992 Yoong Nyook Shin entered caveats on five sub-divided lots of land, namely (i) HS(M) 2894 PTD 8607, (ii) HS(M) 2895 PTD 8603, (iii) HS(M) 2925 PTD 8638, (iv) HS(M) 2926 PTD 8639, and (v) HS(M) 2927 PTD 8640 and Yong Fai Sern entered caveats on four sub-divided lots of land, namely, (i) HS(M) 2860 PTD 8573, (ii) HS(M) 2957 PTD 8670, (iii) HS(M) 2864 PTD 8577, and (iv) HS(M) 2863 PTD 8576. In 1998 Yoong Nyook Shin re-entered caveats on the five sub-divided lots and Yong Fai Sern re-entered caveats on the four sub-divided lots; in 2004 Yoong re-entered caveats on the five sub-divided lots and Yong Fai Sern re-entered caveats on only three of the four sub-divided lots leaving out lot HS(M)2957 PTD 8670. As at the date of the trial a total of eight sub-divided lots of land are caveated by Yoong Nyook Shin and Yong Fai Sern. These eight sub-divided lots represent Yoong and Yong's entitlements under the housing development project after the conversion and sub-division of the original Lot 3660 and Lot 2100. Consequently, the eight sub-divided lots could not be transferred to the plaintiff.

Defendant's Contention

[10] The defendant contends that pursuant to the Share Sale Agreement it is the vendors and not the defendant who must remove the caveats. The defendant has no obligation whatsoever to remove the caveats. Any oral evidence to the effect would be contrary to s. 92 of the Evidence Act 1950 in attempting to contradict or add to the Share Sale Agreement. According to the defendant the total price of RM2,750,000 for the shares under the Share Sale Agreement was paid. In cross-examination the defendant also denied that the Share Sale Agreement was later abandoned and cancelled.

[11] The defendant also contends that even assuming that the defendant breached his promise in 1992 or 1993 to remove the caveats, the plaintiff's claim is barred by limitation under s. 6(1)(a) of the Limitation Act 1953.

[12] The defendant further contends that the plaintiff had no interest in Lot 2043 as it never purchased it from MDV. In 1993 the plaintiff had purchased 115 sub-divided lots excluding Lot 2043 from MDV and on 11 December 1993 sold all 115 sub-divided lots to Sime Hup Sdn. Bhd. and 104 sub-divided lots were transferred to the plaintiff by MDV. The plaintiff now has no interest whatsoever in the 115 sub-divided lots. The plaintiff has no interest in Lot 2043 sold by Loh Wan Chek to the defendant and transferred direct by MDV to the defendant's nominee, Chin Leong Lee Kee Sdn. Bhd. There is therefore no privity of contract between the plaintiff and the defendant.

Finding Of The Court

[13] PW1 (one of the vendors) said that the Share Sale Agreement was abandoned as the arrangement was not practical; PW1 also said that as MDV had other liabilities the parties proceeded with the sale of the land. PW1's evidence is corroborated by PW3. The defendant's contention is contradicted by the uncontroverted evidence of PW1 and PW3. The court finds that the defendant's contention is not plausible because PW1 and PW3 appear to be credible witnesses and their evidence was consistent. Further, according to a SSM search report on MDV as at 28 August 2009 the shares are still in the vendors' names. If, as the defendant contends, the purchase price for the shares has been fully paid, why are the shares not registered in the defendant's name; the defendant did not produce any evidence to explain why no steps or any legal action was taken against the vendors of the shares to effect a transfer of the shares. There is no evidence to show that the purchase price of RM2,750,000 was paid. The defendant's contention is also inherently improbable in the light of the agreement dated 16 February 1993 which he entered into for the transfer of Lot 2043; the defendant subsequently sold Lot 2043 to Chin Leong Lee Kee Sdn. Bhd for RM900,000 on 12 April 1993. The 107 sub-divided lots were transferred to the plaintiff pursuant to the oral agreement. It is also important to note that under the Share Sale Agreement MDV's assets as stated in Schedule Three include the 115 sub-

divided lots and Lot 2043. This is inconsistent with the sale and transfer of the 115 sub-divided lots to the plaintiff and the transfer of Lot 2043 to the defendant. Is it conceivable that the defendant entered into the Share Sale Agreement where the purchase price of the shares of RM2,750,000 includes properties which have already been sold to third parties? The evidence shows that the Share Sale Agreement was not intended to be acted upon by the parties when by a subsequent agreement dated agreement on 12 April 1993 the defendant sold Lot 2043 to Chin Leong Lee Kee Sdn. Bhd. for RM900,000. In the light of the aforesaid the testimonies of PW1 and PW3 that the Share Sale agreement was abandoned is in accord with the facts. In the circumstances the court finds that the defendant's contention that it is the vendors in the share sale agreement who should remove the caveat is unsustainable. As the Share Sale Agreement was abandoned by the parties it follows that the said agreement was never intended to be acted upon. Under s. 92 of the Evidence Act 1950 evidence of oral agreement is excluded to vary the terms of a written contract. However, it does not affect the question of whether the parties had agreed to contract on the terms set out in the document. Oral evidence is admissible to show that a document executed by a party was never intended to be acted upon as an agreement but was brought about into existence for the purposes of creating evidence of some other matter (see *Tyagaraja Mudaliar & Anor v. Vedathanni* [1936] MLJ 62 Privy Council). For the foregoing reasons the court finds that on a balance of probabilities towards the end of 1992 there was an oral agreement as contended by the plaintiff. The defendant agreed to utilise the proceeds of sale of Lot 2043 to settle all the landowners' interest in the housing development project. After Lot 2043 was transferred to the defendant, he sold it to Chin Leong Lee Kee Sdn. Bhd for RM900,000 in 1993. The defendant then settled with the owners of Lot 2100 and Lot 2043. The defendant, however, failed to settle the interests of Yoong Fai Sern and Yong Nyook Shin, the co-owners of Lot 3660. The court finds that in failing to do so the defendant has committed a breach of his obligations under the oral agreement.

[14] As to the issue on limitation, the defendant's contention is premised on the fact that the cause of action giving rise to the plaintiff's claim arose in 1992 or 1993. In the case of actions founded on a contract or tort, as is the present case, the cause of action would have expired in 1999, ie, after the expiration of

six years from the date on which the cause of action accrued. The law on when a cause of action accrues is well settled. In an action founded on a contract the cause of action accrues on the date of its breach and time begins to run from that breach (*The Great Eastern Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717 FC). What is a "cause of action"? In *Nasri v. Mesah* [1970] 1 LNS 85 FC the Federal Court said:

> A "cause of action" is the entire of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher M.R. in *Read v. Brown*). In *Reeves v. Butcher* Lindley L.J. said:
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> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cagzer, Irvine & Co.* [1927] AC 610, 617 Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J. in *Gibbs v. Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 325). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[15] In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 the Supreme Court in the words of Hashim Yeop A Sani (CJ) put the principles succinctly:

> From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[16] In the present case there was no precise time specified for the performance of the defendant's obligations to remove the caveats on the sub-divided lots. This situation posits the question of when did the cause of action arise. The court accordingly invited the parties to submit on the following question - "When does the cause of action arise where no precise time for performance is stipulated?"

[17] Learned counsel for the plaintiff submitted that the existence of a person who can sue and another who can be sued arose only when the defendant breached the oral agreement by failing to comply with the plaintiff's demands within the stipulated deadlines therein (made *vide* letters dated 15 May 1997 or 28 May 2002) and/or by refusing to perform his obligation under the oral agreement. Only then the cause of action was complete (*Law of Contract*, 3rd edn, Dato' Seri Visu Sinnadurai at p. 675-768; *Ban Hong Joo Mines Ltd v. Chen & Yap Ltd* [1968] 1 LNS 13; *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 1 LNS 75; *Lim Kean v. Choon Koon* [1969] 1 LNS 94). Learned counsel also submitted, in the alternative, that the plaintiff's action is an action to recover land which limitation period is 12 years under s. 9 of the Limitation Act, 1953 (*Ponnusamy & Anor v. Nathu Ram* [1958] 1 LNS 46.

[18] Learned counsel for the defendant submitted that the plaintiff's cause of action is barred by laches and limitation. PW3 admitted during cross-examination that he cannot recall when the defendant committed the breach. PW3 also said that the breach happened about 15 years ago. This brings the breach to 11 February 1994, counting 15 years backwards from 11 February 2009, the day on which PW3 testified. The cause of action accrued on the day of the alleged breach on 11 February 1994, when time began to run. The action must be brought within six years under s. 6(1)(a) of the Limitation Act 1953. The plaintiff's suit was filed on 20 September 2002 which is subsequent to 12 February 2000 the date when limitation had already set in.

[19] In order to determine when the cause of action arose in this case, two essential ingredients must be present: (i) whether there is in existence a person who can sue and another who can be sued; and (ii) whether all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In this situation where no time for performance is specified, the obligation

should be performed within a reasonable time. This principle is encapsulated in s. 47 of the Contracts Act 1950 which provides as follows:

> 47. Time for performance of promise where no application is to be made and no time is specified.
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> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
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> Explanation - The question "what is a reasonable time" is, in each particular case, a question of fact.

What is a reasonable time is therefore a question of fact. In *Nyap Kui Fah v. Len On Contractor* [1977] 1 LNS 9 the Federal Court took the following view:

> Where no time is set for the performance of the contract the law implies that performance must be completed within a reasonable time having regard to the circumstances.

In this connection it is also useful to note s. 54(2) of the Interpretation Acts 1948 and 1967 which provides that "where no time is prescribed within which anything should be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises." (see also *Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89, CA; *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1976] 2 MLJ 177, CA)

[20] On the facts of this case, pursuant to the oral agreement sometime in late 1992 the defendant agreed to settle all the landowners' interest in the housing development project. Pursuant to the oral agreement the three pieces of land were redeemed from the bank; following which Lot 2043 was transferred to the defendant who subsequently sold it to a third party for RM900,000. The defendant acted on his obligations when he settled the interests of the owners of Lots 2100 and 2043 on 12 April 1993. The defendant, however, failed to settle the interests of the co-owners of Lot 3660, Yoong and Yong. Applying the principles aforesaid and having regard to all the circumstances, the court is of the view that a period of one year is a reasonable time for the settlement of Yoong and Yong's

interests. Accordingly, when the defendant still failed to settle Yoong and Yong's interests on or by the end of 1994, all the conditions were present to enable the plaintiff to sue on its rights. By the end of 1994 all the pertinent facts have already happened which entitle the plaintiff to sue the defendant on the oral agreement. The cause of action would have accrued on 31 December 1994. In 1997 the plaintiff issued a letter of demand to the defendant. As the defendant failed to comply with the plaintiff's demand the plaintiff issued another demand in May 2002 after which the present suit was filed in September 2002. In the aforesaid circumstances the plaintiff failed to assert or enforce its right within a reasonable time. No explanation was given by the plaintiff for the unreasonable delay between 1994 to 2002. In this regard the plaintiff's claim is barred by laches. The filing of the plaintiff's suit on 20 September 2002 is also outside the six year limitation period which expired on 31 December 2000. The plaintiff's claim is unenforceable for being time barred. In the premises the plaintiff's cause of action is unsustainable. The plaintiff's assertion that the action is an action to recover land is not consonant with the plaintiff's claim or with the facts. Lot 2043 had already been sold to a third party. The plaintiff's claim is, *inter alia*, a monetary claim for RM900,000 and not for the recovery of Lot 2043. For the foregoing reasons, the plaintiff's claim is dismissed with costs.